OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 96-86 **December 9, 1996**

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: B. Allan Benson, Acting Associate General Counsel

SUBJECT: Joint Employer Status and Appropriate Joint Employer Units

The Board heard oral argument on December 2, 1996 in several matters (Jeffboat Division, American Commercial and Marine Services Co., Case 9-UC-406, et al.), to address issues concerning joint employer status and whether consent of all joint employers should be necessary before jointly employed employees can be included in a unit with employees solely employed by one of the joint employers (see Greenhoot, Inc., 205 NLRB 250 (1973)). Attached is the General Counsel's brief to the Board in these matters as amicus curiae. In brief, the General Counsel argues, inter alia, that the Board should return to its traditional test of joint employer status, basing that determination on whether separate entities have so structured their commercial relationship that, in reality, each has actual or potential control over some employment conditions of the employees in question.

Thus, the General Counsel views the current basis on which entities are considered joint employers to be overly restrictive and inconsistent with the Congressional intent that the Act's definition of "employer" be construed broadly. Moreover, the current standard is inconsistent with the expansive view of when an employer is a "joint employer" of a separate entity's employees which the Board had taken prior to the 1980's, and which was similar to the approach currently utilized by courts in construing other federal remedial legislation like Title VII and the FLSA. Since the Board never expressly stated any intent to abandon its earlier, more expansive joint employer precedent when it began requiring actual control over certain "essential" employment conditions, and since the quantum of the necessary control is never constant in any given factual situation, the Regions should begin applying the arguments set forth in the General Counsel's brief when making joint employer determinations in all present and future ULP cases pending the Board's resolution of this issue. Any questions should be directed to the Division of Advice.

With respect to the second issue posed, the General Counsel argues that the application of Greenhoot principles to joint employers should be abandoned as inconsistent with years of Board precedent and sound policy. The General Counsel goes on to argue that rather than requiring consent of all joint employers before finding appropriate a single unit of all their employees, including those controlled and

employed by only one of the joint employers, the Board should simply apply a traditional “community of interest” analysis. Under this approach, where one of the joint employers exercises sufficient right of control over both sets of employees such that the commercial enterprise consists of "non-competing" employers and other "community of interest” principles are satisfied, a single appropriate unit would be found. Because in making this argument the General Counsel is urging the Board to overrule clear, extant precedent, Regions should submit to the Division of Advice any unfair labor practice case in which this argument would be appropriate.

Extant Board law should be followed by the Regional Director in making unit determinations in representation cases, even in those situations where application of the arguments articulated in the General Counsel’s brief in Jeffboat would require a different result.

Any questions concerning the application of this memorandum in the representation case context may be addressed to me or to your Assistant General Counsel.

B. A. B.

Attachment

MEMORANDUM OM 96-86

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

JEFFBOAT DIVISION,
AMERICAN COMMERCIAL
AND MARINE SERVICES CO.
AND T.T.& O. ENTERPRISES INC.,
Employer

and Case 9-UC-406

GENERAL DRIVERS, WAREHOUSEMEN &
HELPERS LOCAL UNION 89,
AFFILIATED WITH INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
AFL-CIO
Petitioner

M.B. STURGIS, INC.
Employer

and Case 14-RC-11572

TEXTILE PROCESSORS, SERVICE
TRADES, HEALTH CARE,
PROFESSIONAL & TECHNICAL
EMPLOYEES INTERNATIONAL UNION
LOCAL 108
Petitioner

VALUE RECYCLE, INC.
Employer

and Case 33-RC-4042

LABORERS LOCAL NO. 75,
LABORERS INTERNATIONAL
UNION OF NORTH AMERICA
AFL-CIO
Petitioner

BRIEF OF THE GENERAL COUNSEL

On October 10, 1996, the National Labor Relations Board issued a notice of oral argument in the three above-captioned cases, directing that certain issues be addressed regarding joint employer status and whether consent of all joint employers is necessary before jointly employed employees can

be included in a unit with employees solely employed by one of the joint employers. On November 14, 1996, the Board granted the General Counsel's motion to appear and file briefs as *amicus curiae*.

Interest of the General Counsel

The General Counsel, while not formally a party to representation proceedings, shares with the Board the concern that "questions preliminary to the establishment of the bargaining relationship be expeditiously resolved." NLRB v. O.K. Van Storage, 297 F.2d 74, 76 (5th Cir. 1961). Of course, representation proceedings must also serve the goals of resolving questions of representation accurately and fairly. See, for example, NLRB v. A.J. Tower Co., 329 U.S. 324, 330-331 (1946) ("the Board must adopt policies and promulgate rules and regulations in order that employees' votes may be recorded accurately, efficiently and speedily").

Under Section 3(d) of the Act (29 U.S.C. 153(d), the General Counsel exercises "general supervision...over the officers and employees in the [Board's] regional offices." Since 1961, under the authority granted it in Section 3(b) of the Act, "the Board [has delegated] to its Regional Directors 'its powers under section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a

secret ballot under subsection (c) or (e) of Section 9 and certify the results thereof.'" 26 Fed. Reg. 3911 (Apr. 28, 1961), reprinted in National Labor Relations Board, Rules and Regulations and Statements of Procedure, 199 (1992). Accordingly, the General Counsel has a direct involvement and a substantial interest in the processing of representation cases because of his supervisory authority over the activities of the Regional Directors and their staffs. See also Board's Rules and Regulations, Secs. 102.60-102.72; Statements of Procedure, Secs. 101.17-101.21.

Finally, the General Counsel maintains an interest in these proceedings because he is responsible for prosecuting unfair labor practice charges which allege interference with, or restraint or coercion of, the exercise of Section 7 rights of employees of alleged joint employers, as well as those which allege refusals to bargain by alleged joint employers in an appropriate unit. Since the allegations in such cases potentially implicate the issues to be addressed in oral argument, the General Counsel is vitally concerned that his views upon such issues be considered.

Representation proceedings are non-adversarial in nature, and the General Counsel does not take a position on the merits in representation cases. Therefore, he expresses no view on what decision should be reached in these cases. The General Counsel believes, however, that his views, set forth below, of

the appropriate test to be used in determining whether entities constitute joint employers of employees and on whether employees of joint employers can be included in a unit with employees employed by only one of those employers without the consent of all the joint employers, can be of assistance to the Board in resolving issues raised by these cases.

STATEMENT OF ARGUMENTS

The increasing resort by employers to supplement their permanent employee complements with "contingent" or "temporary" workforces, especially by contracting with entities that supply labor, and the resulting frustration of employee rights to self-organization, mandate that the Board reexamine the overly restrictive basis on which entities currently are considered joint employers of employees which has developed since the 1980s. The Board should return to using its traditional test of viewing control over employment conditions in light of the parties' commercial relationship, which often is held out to the public as an integrated entity. This traditional test essentially is the "hybrid" test applied by courts construing the definition of "employer" under Title VII.

The current requirement that employees of joint employers cannot be included in a unit with employees employed by only

one of those employers absent consent of all joint employers should be abandoned, since it is not required by the law governing multiemployer bargaining and is inconsistent with the Board's traditional methods of deciding the appropriateness of units.

TRADITIONAL JOINT EMPLOYER ANALYSIS UNDER THE NLRA

A company is a "joint employer" of a separate entity's employees under the NLRA where it shares or codetermines matters governing essential terms and conditions of employment of these employees.[1] Determining joint employer status has always been a factual issue regardless of how the Board has defined the standard.[2] However, prior to the 1980s, the Board consistently held, with court approval, that where separate parties to commercial business relationships had actual or potential control over employment conditions, which could be established by holding themselves out to the public as an integrated enterprise, those business relationships conferred

[1] NLRB v. Browning-Ferris Industries, 691 F.2d 1117, 1123 (3d Cir. 1982), citing the Board's standard set forth, *inter alia*, in C.R. Adams Trucking, 262 NLRB 563, 566 (1982), enfd. 718 F.2d 869 (8th Cir. 1983), and NLRB v. Greyhound Corp., 368 F.2d 778, 780 (5th Cir. 1966), quoting 153 NLRB 1488, 1495 (1965). The latter case followed the Supreme Court's determination that joint employer status is unaffected by the possibility that one entity is an independent contractor in Boire v. Greyhound Corp., 376 U.S. 473, 481 (1964), where, interestingly, the Court also approved the Board's stated standard of "sufficient control over the work of the employees to qualify as a joint employer."

[2] Boire v. Greyhound Corp., 376 U.S. at 481.

sufficient **right of control** to make the separate entities joint employers.

Right to control some employment conditions

Thus, joint employer findings often were based solely on unexercised ability to control employees reserved in license, lease, or other commercial agreements. See Hoskins Ready-Mix Concrete, 161 NLRB 1492 (1966), where a user leased trucks and had the contractual authority to, but did not exercise, "overall supervision and direction" of the supplier's leased employees. The Board cited NLRB v. New Madrid Manufacturing Co., 215 F.2d 908 (8th Cir. 1954), where "the court found that a test of coemployership was whether 'the contract, either expressly or by implication, purport[s] to give New Madrid any voice whatsoever in the selection or discharging of Jones' employees, in the fixing of wages for such employees, or in any other element of labor relations, conditions and policies in the plant.'" 161 NLRB at 1493. In Jewel Tea Co., 162 NLRB 508, 510 (1966), a retail store was found to be a joint employer with two independent companies pursuant to license agreements which reserved to the store the right to control almost all employment conditions (hiring, discharge, wages, hours, etc.) of the licensee employees. The Board expressly found immaterial the fact that the store never exercised that right, stating "an operative legal predicate for establishing

a joint-employer relationship is a reserved right in the licensor to exercise such control and we find such right to control adequately established by the facts set out above." Accord: S.S. Kresge, 161 NLRB 1127 (1966), 169 NLRB 442 (1968), enfd. in rel. part 416 F.2d 1225 (6th Cir. 1969); Gallenkamp Stores Co. v. NLRB, 402 F.2d 525, 531 (9th Cir. 1968), enforcing 162 NLRB 498 (1966), and quoting from Thriftown, 161 NLRB 603 (1966): "Since the power to control is present by virtue of the operating agreement, whether or not exercised, we find it unnecessary to consider the actual practice of the parties...."[3]

Moreover, in AMP, 218 NLRB 33, 35 (1975), the Board found that a supplier that merely recruited and referred employees to the user (which could refuse any referral), and prepared weekly paychecks which were forwarded to the user for distribution, was a joint employer with the user. Thus, entities could be joint employers even if one only exercised control over "some" employment conditions, since that control necessarily makes it "an" employer of the employees within the meaning of Section 2(2). See Management Training Corp., 317 NLRB 1355, 1358 (1995).

The reality of the business relationship

[3] See also Frostco Super Save Stores, 138 NLRB 125 (1962); Spartan Department Stores, 140 NLRB 608 (1963).

Prior to 1980, the reality of the business relationship was an important consideration in a joint employer analysis. In this regard, in Jewell Smokeless Coal, 170 NLRB 392, 393 (1968), 175 NLRB 57 (1969), enfd. 435 F.2d 1270 (4th Cir. 1970), the Board found that Jewell, a coal processor, was a joint employer with operators that mined coal on Jewell's properties even though it played no role in hiring, firing or directing operator employees, stating:

> Under the circumstances, and considering the industrial realities of the coal mining industry, the conclusion is inescapable that Jewell is a necessary party to meaningful collective bargaining and is, at least, "an employer" of the employees sought by the Petitioner, and that all the employees involved share a community of interests.

The Fourth Circuit agreed, 435 F.2d at 1271-72, noting it was sufficient that

> Jewell sometimes loaned money to its mine operators to enable them to purchase equipment, that Jewell provided workerman's compensation coverage on the individual workers in the mines under many of its oral leases, and that Jewell provided engineering services and safety inspections of the mines from which it secures its supply of coal. Most significantly, Jewell provided the electricity to the Horn & Keene mine...Clearly, we think, Jewell exercised *de facto* control over the ten employees....

In addition to finding a right of control in Hoskins Ready-Mix Concrete, *supra*, 161 NLRB at 1493, the Board relied on the fact that the user was contractually obligated to reimburse the supplier for payroll expenses, and therefore the

supplier "would be the ultimate source of any wage increases for [the supplier's] employees that might be negotiated with a union." In Floyd Epperson, 202 NLRB 23 (1973), enfd. 491 F.2d 1390 (6th Cir. 1974), the Board found joint employer status based not only on the user's control over supplied drivers' schedules and assignments, but also on "some indirect control over their wages." Thus, the General Counsel had argued that the supplier's business, and wage increases for the supplier's drivers, completely depended on the user increasing the supplier's contractual remuneration, and that the "close connection" of the drivers with the user's enterprise necessarily establishes control over their work week "as a matter of economic reality." Id. at 26 (footnote omitted). Moreover, in S.S. Kresge Co., *supra*, 161 NLRB at 1128, the Board found "Pursuant to the same standard license agreement which is used nationally, various firms operate departments for the sale of merchandise within the K-Mart Plaza, with the overall appearance being that of a single department store." The Sixth Circuit agreed, 416 F.2d at 1227:

> Most K-Mart stores contain various sales departments, some of which are operated by Kresge and some of which are operated by various licensees. However, the public is given the impression of a single, integrated enterprise since, under the terms of the uniform license agreement governing Kresge's relationships with its licensees, each licensee must "conduct sales on the premises solely under the name of K-Mart."

See also Thriftown, *supra*, where the Board noted the reality of the parties' commercial relationship, i.e. that the entire operation "is designed to create the appearance of an integrated department store" with the operating agreement requiring business to be carried on "in such a manner that it will appear to the public as a department of the business carried on in the store and not as though under separate management." Moreover, since the store could terminate the license agreement at will, "an operator could not easily resist [the store's] views concerning the labor policies applicable to leased department employees." 161 NLRB at 604-605, 607.

Current requirements: actual control of several "essential" conditions

Since the early 1980s and without expressly evidencing any intent to overrule prior Board cases, the Board has utilized a joint employer standard which examines employers' ability to control such "essential" employment conditions as "hiring, firing, discipline, supervision and direction" of employees.[4] The Board has applied this standard in a rather narrow fashion, requiring a significant degree of actual control before the employer in question will be deemed a joint employer.[5] For example, in TLI, Inc., 271 NLRB 798 (1984),

[4] Laerco Transportation, 269 NLRB 324, 325 (1984).

[5] See e.g. Goodyear Tire & Rubber Co., 312 NLRB 674, 677-78, 687-90 (1993) (client's contractual right to maintain operational control, direction and

enfd. mem. 120 LRRM 2631 (3d Cir. 1985), the Board refused to find a client that leased drivers from a separate agency was a joint employer, even though the client had the authority and responsibility under the lease agreement for maintaining operational control, direction, and supervision over the drivers; the drivers reported daily to the client's facility for instructions on deliveries, returned their trucks to the client's premises when they were finished with their routes, and reported mechanical problems or other problems on the road to the client; the client's foreman notified drivers required to work during their vacations; the client kept driver logs and records; drivers worked exclusively for the client; and in collective bargaining sessions between the leasing agency and the drivers' union, the client participated and made clear that without transportation cost savings of a certain amount, the lease agreement would be jeopardized and alternatives were being considered.[6]

In Laerco Transportation, 269 NLRB at 324, the driver service agreement provided that the client would supply the

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supervision of contractor's drivers and fact that formula by which drivers were paid was set forth in the cost-plus contract between the employers, held insufficient evidence of actual client control to establish joint employer relationship).

[6] Of course, federal court enforcement of Board orders applying the joint employer standard in a narrow manner does not constitute a finding that such application is legally required, or even agreement with that practice: "[b]ecause the [joint employer] issue is essentially factual, we must affirm the Board's conclusion if it is supported by substantial evidence on the record as a whole." Carrier Corp. v. NLRB, 768 F.2d 778, 781 (6th Cir. 1985).

vehicles used by the contractor's drivers, the drivers were to perform trucking services under the client's direction and comply with safety regulations as the client may require, the client would determine driver qualifications and the client could refuse to accept any driver from the contractor that did not meet those qualifications. Once assigned to the client, the employee was informed of his job duties and facility safety considerations by the client, the contractor, or both, and the assignment was usually permanent. Id. at 325. The contractor had no supervisors at the client's facility, the client attempted to resolve minor personnel problems, the drivers reported to the client's warehouse each morning where they received initial directions regarding deliveries and routes to be followed, and a customer of the client occasionally would tell a driver to give priority to one order over another. Id. Nevertheless, the Board held that the client's supervision over the contractor's employees was "of an extremely routine nature" and the client did not "possess sufficient indicia of control over [the contractor's] employees to support a joint employer finding." Id. at 325-26.

This amount of control is clearly more than what had been required for the Board to find joint employer status in earlier years (compare cases described above), and is

inconsistent with the Congressional intent that the Act's definition of "employer" be broadly construed. Moreover, it is inconsistent with how the courts have defined "employer" in other federal remedial legislation like Title VII of the Civil Rights Act of 1964 and the Fair Labor Standards Act.

STATUTORY BASIS FOR BROADLY CONSTRUING "EMPLOYER"

The NLRA, along with other Federal remedial legislation like Title VII and the FLSA, "must be read in the light of the mischief to be corrected and the end to be attained." The Act

> was designed to avert the "substantial obstructions to the free flow of commerce" which result from "strikes and other forms of industrial strife or unrest" by eliminating the causes of that unrest. It is premised on explicit findings that strikes and industrial strife themselves result in large measure from the refusal of employers to bargain collectively and the inability of individual workers to bargain successfully for improvements in their "wages, hours, or other working conditions" with employers....Hence the avowed and interrelated purposes of the Act are to encourage collective bargaining and to remedy the individual worker's inequality of bargaining power by "protecting the exercise of ...self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid and protection."[8]

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[7] NLRB v. J. Weingarten Inc., 420 U.S. 251, 262 (1975), quoting NLRB v. Hearst Publications, 322 U.S. 111, 124 (1944). This principle of construction no longer applies to the term "employee" under the Act, as discussed below. See Nationwide Mutual Insurance Co. v. Darden, 503 U.S. 318, 325 (1992).

[8] Id. at 126 (citing 29 U.S.C.A. Sec. 151).

The Board, as the agency entrusted by Congress to administer the NLRA, has the power to make rational changes in the interpretation and application of the Act in light of evolutions in employment relationships and the American economy.[9] The concept of what is still termed "economic reality" has been a significant part of past applications of the NLRA. In NLRB v. Hearst Publications, 322 U.S. 111, 128-29 (1944), the Court specifically addressed the Board's broad construction of the term "employee" under the Act,[10] but also, in dicta, indicated that economic reality was the appropriate approach for "employer" determinations under the NLRA. Thus, the Court noted:

> To eliminate the causes of labor disputes and industrial strife, Congress thought it necessary to create a balance of forces in certain types of economic relationships....Its Reports on the bill disclose clearly the understanding that "employers and employees not in proximate relationship may be drawn into common controversies by economic forces," and that the very disputes sought to be avoided

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[9] See NLRB v. J. Weingarten Inc., 420 U.S. at 266 ("[t]he responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board").

[10] The Hearst court held that the determination of whether a worker was an independent contractor was not relevant to the determination of whether that person was an "employee" under the NLRA, noting that "[t]he mischief at which the Act is aimed and the remedies it offers are not confined exclusively to 'employees' within the traditional legal distinctions separating them from 'independent contractors,'" and that "employee" determinations should be guided by economic reality. 322 U.S. at 126, 129. However, as noted in Boire, 376 U.S. at 481, the 1947 amendment of Section 2(3), specifically excluding independent contractors from the definition of employee, overruled Hearst in this limited respect. The 1947 amendments also effectively rejected the use of an economic reality approach for "employee" determinations in favor of the narrower principles of agency law. NLRB v. United Ins. Co. of America, 390 U.S. 254, 256 (1968); NLRB v. Amber Delivery Service, 651 F.2d 57, 64 n.8 (1st Cir. 1981).

> might involve "employees (who) are at times brought into an economic relationship with employers who are not their employers." In this light, the broad language of the Act's definitions, which in terms reject conventional limitations on such conceptions as "employee," "**employer**," and "labor dispute," leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying **economic facts** rather than technically and exclusively by previously established legal classifications... [Terms] must be understood with reference to the purpose of the Act and the facts involved in the economic relationship. "Where all the conditions of the relation require protection, protection ought to be given."[11]

We recognize that Section 2(2), defining "employer," was amended in 1947 to replace "any person acting in the interest of an employer" with "any person acting as an agent of the employer:"

> Under [the prior] language the Board frequently "imputed" to employers anything that anyone connected with an employer, no matter how remotely, said or did, notwithstanding that the employer had not authorized what was said or done, and in many cases even prohibited it. By such rulings, the Board often was able to punish employers for things they did not do, did not authorize, and had tried to prevent.[12]

The use of agency language in the amendment was meant only to prevent the Board from imposing liability on employers for unfair labor practices committed by supervisory employees which were unauthorized and/or specifically prohibited by the

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[11] NLRB v. Hearst Publications, 322 U.S. at 128-29 (emphasis added, citations omitted).

[12] I Leg. Hist. of the LMRA of 1947, 302 (House Report No. 245 at 11) (citations omitted).

employer.[13] Thus, the 1947 amendment clearly was never meant to foreclose the use of a commercial reality approach when making "employer" determinations under the NLRA, and Hearst still provides viable guidance regarding rational NLRA interpretations, including a broad construction of the term "employer" under the Act. In this regard, as the 1960 cases illustrate, the Board with court approval utilized exactly such an approach.

Joint employer status under Title VII and the FLSA

Generally

The federal courts, when interpreting other remedial social legislation, have taken an expansive view of when an employer is a "joint employer" of a separate entity's employees. It is a familiar canon of statutory construction that remedial legislation should be liberally construed to effectuate the purpose of the statute.[14] Title VII, a remedial statute designed to eliminate employment discrimination based on protected status, is liberally

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[13] Id., citing cases involving, *inter alia*, supervisors soliciting support for a company union and coercing employees in the exercise of their Section 7 rights. The Board's current standard for imposing liability on an employer for unfair labor practices committed "solely" by its joint employer is consistent with that limited Congressional concern. See Capitol EMI Music, 311 NLRB 997 (1993).

[14] Tcherepnin v. Knight, 389 U.S. 332, 336 (1967). Of course, the courts will not read into the statute a legislative intent that simply does not exist. Chappell v. Robbins, 73 F.3d 918, 924 (9th Cir. 1996).

construed to achieve that purpose.[15] The Fair Labor Standards Act, designed to "eliminate low wages and long hours" and to "free commerce from the interferences arising from production of goods under conditions that [are] detrimental to the health and well-being of workers," is also construed broadly to achieve those purposes.[16] Joint employer status under Title VII and the FLSA is determined largely in light of the "economic reality" of employment relationships, the background against which sufficiency of control over employee working conditions is measured.

Some courts have used a pure "economic realities" test in determining employee status, i.e. persons are considered employees if they, "as a matter of economic reality, are dependent upon the business to which they render service." Mednick v. Albert Enterprises, 508 F.2d 297, 299 (5th Cir. 1975), quoting Bartels v. Birmingham, 332 U.S. 126, 130 (1947) (FLSA); Bureerong v. Uvawas, 922 F.Supp. 1450, 1467-68 (C.D. Cal. 1996) (same); Hill v. New York City Bd. of Educ., 808 F.Supp. 141, 146-48 (E.D.N.Y. 1992) (Title VII) (driver employed by bus company was also employee of city board, which had "exclusive power to certify" him to drive on school bus

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[15] Hart v. J.T. Baker Chemical, 598 F.2d 829, 831-32 (3d Cir. 1979); Bell v. Brown, 557 F.2d 849, 853 (D.C. Cir. 1977) (the court also noted that "where congressional purpose is unclear, the courts have traditionally resolved ambiguities in remedial statutes in favor of those whom the legislation was designed to protect").

routes and "indirectly exercised significant control over [his] work" through regulations and policies), citing Spirt v. Teachers Insurance & Annuity Assn., 691 F.2d 1054, 1063 (2d Cir. 1982). However, most courts construing such definitions as "employer" broadly in order to effectuate the remedial goals of federal social legislation utilize a "hybrid" economic realities/right of control test which closely resembles the Board's traditional joint employer standard, as described below.

Hybrid test

In Title VII cases, many courts have used a "hybrid" test consisting of an economic reality analysis with the extent of the employer's right to control the means and manner of the employee's performance being the most important factor. See Magnuson v. Peak Technical Services, 808 F.Supp. 500, 509 (E.D.Va. 1992); Amarnare v. Merrill Lynch, Pierce, Fenner & Smith, 611 F.Supp. 344, 347-48 (S.D.N.Y. 1984). "As the sparse authority reflects, the term 'employer' under Title VII should be 'construed in a functional sense to encompass persons who are not employers in conventional terms, but who nevertheless control some aspect of an individual's compensation, terms, conditions, or privileges of employment'." Magnuson, 808 F.Supp. at 507-08 (citations omitted). See also Hill v. New York City Board of Education,

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[16] Usery v. Pilgrim Equipment Co., 527 F.2d 1308, 1310-11 (5th Cir. 1976)

supra, 808 F.Supp. at 147-48, quoting Spirt v. Teachers Insurance & Annuity Assn., *supra*, 691 F.2d at 1063: "the term 'employer,' as it is used in Title VII, is sufficiently broad to encompass any party who significantly affects access of any individual to employment opportunities, regardless of whether that party may technically be described as an 'employer'...at common law." Moreover, "control over the work conditions of the individual is a significant factor in the 'hybrid' test... in that the power to determine the rules of conduct for employees -- and the power to adjudicate alleged infractions of those rules -- is an element of the power to affect access to employment opportunities." Hill, 808 F.Supp. at 148 n.6.

In Magnuson v. Peak Technical Services, 808 F.Supp. at 508, the court found the user be a joint employer even though the supplier retained control over the plaintiff employee's paychecks and benefits, entered into a written contract with the employee, and the employee reported to the supplier's supervisors. The employee was merely required to work on the user's premises, work with the user's personnel, attend sales meetings, engage in all aspects of selling vehicles except for actually closing the deal and processing the final papers, and possibly submit to the authority of the user's general manager. 808 F.Supp at 510. The user's sales manager, who

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(quoting Rutherford Food Corp. v. McComb, 331 U.S. 722, 727 (1947)).

monitored plaintiff's hours and reported them back to the supplier, may also have thereby supervised her and these minimal control elements, when viewed against the economic reality of the actual working relationship, would be sufficient to find a joint employer relationship.

In Virgo v. Riviera Beach Associates, 30 F.3d 1350, 1359-61 (11th Cir. 1994), a Title VII case, the court found the owner of a hotel and management company to be joint employers where their contract reserved to the owner final responsibility over any labor negotiations at the hotel and the *right to approve* any of the manager's hiring and discharge decisions, along with the duty to pay employees if the manager did not, and an employee considered herself employed by the owner. While stating that courts generally looked to NLRB joint employer determinations for guidance, it found that the owner's "right of control" was factually sufficient to satisfy Boire v. Greyhound, *supra*.

When examining the "joint employer" issue under the FLSA, the courts look at control factors similar to some of those examined under the NLRA. Thus, in varying combinations, courts consider the power to hire and fire employees, supervision and control over employee work schedules or conditions of employment, determination of the rate and method of payment, and maintenance of employment records. Bonnette v. California Health & Welfare Agency, 704 F.2d 1465, 1470 (9th

Cir. 1983); Carter v. Dutchess Community College, 735 F.2d 8, 12 (2d Cir. 1984) ("[t]he power to control a worker clearly is a crucial factor in determining whether an employment relationship exists"). Again however, as under Title VII, when examining control factors the courts, unlike the recent Board decisions, look to the degree of control exercised in light of the economic reality of the business relationship to determine joint employer status under the FLSA. See Bonnette, 704 F.2d at 1469-70 (user determined rates of pay, hours of work and tasks to be performed, giving it effective economic control over the employment relationship even though supplier apparently hired, fired and supervised workers). In Hodgson v. Griffin and Brand of McAllen, 471 F.2d 235, 238 (5th Cir. 1973), the court upheld a joint employer finding under the FLSA where the work took place on the user's premises, the user's field supervisors oversaw the harvest work by communicating with the supplier's crew leaders who in turn spoke to the harvest workers, and the user set the rate of pay, decided whether the crew leaders would pay a piece rate or an hourly rate in a given instance and handled the workers' social security contributions. Cf. Laerco Transportation, 269 NLRB at 324-26, where the Board refused to find joint employer status even though the user "controlled" many more aspects of the manner in which the supplier's drivers performed their work, as more fully set forth above.

This hybrid test is essentially what Board used prior to the 1980s, i.e. an examination of a direct or indirect right to control employment conditions based on the reality of how separate entities structured their commercial dealings with each other. Therefore, the Board is free to adopt this standard as the embodiment of its traditional test for joint employers, which maximized employee ability to make free representational choices and promoted meaningful collective bargaining.

GREENHOOT CONSENT REQUIREMENT AND JOINT EMPLOYERS

Multiemployer consent principles historically limited to competing employers: Overview

In NLRB v. Truck Drivers Local 449 (Buffalo Linen Supply), 353 U.S. 87, 94-95 (1957), the Supreme Court noted:

> Multi-employer bargaining long antedated the Wagner Act, both in industries like the garment industry, characterized by numerous employers of small work forces, and in industries like longshoring and building construction, where workers change employers....At the time of the debates on the Taft-Hartley amendments, proposals were made to limit or outlaw multi-employer bargaining. These proposals failed....They were met with a storm of protest that their adoption would tend to weaken and not strengthen the process of collective bargaining and would conflict with the national labor policy of promoting industrial peace through effective collective bargaining.

The legislative history to which the Court referred is replete with attempts to abolish any multiemployer bargaining even on

an industry-wide basis, i.e. among competing employers. On the other hand, the Board has noted that as to non-competing employers, the cornerstone of its appropriate unit policies

> is the community-of-interest doctrine, which operates "to group together only employees who have substantial mutual interests in wages, hours, and other conditions of employment."... "Such a mutuality of interest serves to assure the coherence among employees necessary for efficient collective bargaining and at the same time to prevent a functionally distinct minority group from being submerged in an overly large unit."

Maramount Corp., 310 NLRB 508, 510-11 (1993), quoting 15 NLRB Ann. Rep. 39 (1950) and Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass, 404 U.S. 157, 172-73 (1971). In Maramount, the Board found an individual employer, rather than a multiemployer, unit appropriate because, *inter alia*, there was a wide diversity of businesses among the association members and no evidence of employee interchange or common supervision.

Since the early days of the Wagner Act, in determining the appropriateness of units where more than one employer was involved, the Board first examined whether the employers were competitors or engaged in furtherance of a common enterprise. Where the employers were competing and did not control working conditions of employees other than their own, the Board refused to find a single unit of their employees appropriate absent express or implied consent of the employers. See

Aluminum Line, 8 NLRB 1325, 1341 (1938), where the Board found inappropriate a port-wide unit encompassing several competing steamship companies-association members because the individual employers retained "direct control over the essential employer functions" and were not bound to association-negotiated contracts. However, where competing employers consent to be bound by group action, a community of interest may exist to justify finding a single multiemployer unit appropriate. See Shipowners' Assn. of the Pacific, 7 NLRB 1002, 1022-25 (1938), rev. denied *sub nom.* AFL v. NLRB, 103 F.2d 933 (D.C. Cir. 1939), affd. 308 U.S. 401 (1940) (Board rejected argument that only single-employer, individual-port units were appropriate because while some work rules varied from port to port, most essential work rules were formulated on a coast-wide basis and individual employers exercised very few "essential attributes of the employer-employee relationship"); Kausel Foundry Co., 28 NLRB 906, 909 (1941) (multiemployer unit appropriate where companies were part of a committee through which they had "operated as a unit in their bargaining relations" with the union and, even before their participation in the committee, there was considerable employee interchange, similar product production, and similar employee wages, hours and working conditions among the companies). Thus, only employees of competing employers which do not somehow jointly control each other's workforces **cannot** share a community of interest to

justify the imposition of a common unit absent employer consent.

On the other hand, where the employers were not competing with each other but jointly controlled employee working conditions, the Board found a single unit of their employees appropriate whenever a community of interests existed. Compare Sa-Mor Quality Brass, 93 NLRB 1225 (1951) (one unit appropriate where some employee transfer and sharing common vacation benefits, recreational facilities, and skills required by each involved company), with Union Lumber Co., 7 NLRB 1094 (1938) (single unit inappropriate where no evidence of user control over supplier's employees). Consent of the individual employers involved has always been irrelevant in such cases. Where "a group of employers have banded together so as to set up joint machinery or hiring employees, for establishing working rules for employees... [these are] facts we believe to be 'sufficient indicia of control' to warrant the joint employer finding." NLRB v. Checker Cab Co., 367 F.2d 692, 698 (6th Cir. 1966). The court thus approved the Board's finding, Checker Cab Co., 141 NLRB 583, 586 n.5 (1963), that

> mutuality does exist in this area sufficient for our finding that Checker and its members are engaged in a joint venture... our decision does not purport to establish a "multiemployer bargaining association." Having elected to subject their employees to

regulation on a joint basis, the employers within Checker must likewise accept the statutory right of their employees to join together for the purposes of collective bargaining.

Nothing in Section 9(b) or its legislative history mandates a consent requirement when several entities control employees who share a community of interests

There was considerable discussion during Congressional hearings on the subject of multiple-employer bargaining (referred to as "industry-wide bargaining") in 1935 and 1947. While drafts of legislation did contain language expressly proscribing units comprised of the employees of more than one employer, neither the Wagner Act nor the Taft-Hartley Act contains any such provision.[17] Thus, in 1947 a new Section 9(f) would have banned multi-employer units comprised of employees of competing employers, unless the employees of each employer numbered fewer than 100, and the employers' facilities were less than 50 miles apart. This language suggests that the intent of its sponsors was to prevent the Board from certifying a unit of *competing* employers' employees. This House provision did not pass the Senate, and no comparable language was enacted as the Board's practice of requiring employer consent in such cases satisfied Congress that no such provision was necessary.[18]

Moreover, the legislative history of those statutes also reveals that those members of Congress and industry concerned

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[17] See, e.g., II Leg. Hist. of the NLRA of 1935, 3220-3221 (Debates in House on S. 1958, 79 Cong. Rec. 9727-9728).

[18] See I Leg. Hist. of the LMRA of 1947, 61 (H.R. 3020, As Reported, 30-31) and I Leg. Hist. of the LMRA of 1947, 187-188 (H.R. 3020, As Passed House, 30-31).

with limiting the size of bargaining units to the employees of an individual employer did not seek to preclude a unit covering employees of joint employers, but rather sought to prevent the Board from certifying units which included employees of a given plant and those of several other plants, whereby employees might be "...forced into an agreement in which they had not participated, made by a union to which they did not belong and to which they did not want to belong."[19] Additionally, some in 1947 opposed units which conferred monopolistic power upon labor unions, such that unions could engage in crippling nation-wide strikes.[20]

Legislative History of §9(b) of the NLRA - 1935

Section 9(b) of S. 1958, introduced by Senator Wagner in February 1935, stated: "The Board shall decide whether, in order to effectuate the policies of this Act, the unit appropriate for the purpose of collective bargaining shall be the employer unit, craft unit, plant unit, or other unit." I Leg. Hist. of NLRA of 1935, 1300. A committee amendment was adopted, whereby 9(b) was changed to read: "The Board shall decide in each case whether, in order to insure to employees

[19] See II Leg. Hist. of the NLRA of 1935, 3220 (Debates in House on S. 1958, 79 Cong. Rec. 9727-9728).

[20] See, e.g., I Leg. Hist. of the LMRA of 1947, 672-673 (93 Daily Cong. Rec. H3575, April 16, 1947); Labor Relations Program: Hearings on S. 55 et al. Before the Senate Committee on Labor and Public Welfare, 80th Cong., 1st Sess. 83 (1947) (remarks of Senator Taft).

the full benefit of their right to self-organization and to collective bargaining, and to otherwise effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or other unit." II Leg. Hist. of NLRA of 1935, 3219-3220 (Debates in House on S. 1958, 79 Cong. Rec. 9727-9728).

During the debates in the House on S. 1958, Rep. Ramspeck offered, and the House adopted, the following amendment to the end of 9(b): "*Provided*, That no unit shall include the employees of more than one employer."[21] The impetus for Ramspeck's amendment was *not* concern for unconsenting employers, but that employees have the right to make a free decision as to union representation:

> Mr. Chairman, the whole purpose of this bill, the whole theory of it is that you are giving the employees of this country the right to make their own free decision as to what union they shall belong to, or whether they shall belong to any union at all. Under the committee amendment just adopted, if I construe it correctly, the employees of a given plant might be included in a unit designated by the Board, including several other plants, and forced into an agreement or under an agreement in which they had not participated, made by a union to which they did not belong and to which they did not want to belong.

[21] II Leg. Hist. of NLRA of 1935, 3220-21 (79 Cong. Rec. 9727-28).

The Senate disagreed and in conference, both the Senate and the House later agreed to insert the phrase "or subdivision thereof" rather than Ramspeck's amendment:

> House amendment no. 11, which redrafted section 9(b), embodied two changes from the Senate bill. The first change [i.e. adding the language "in order to insure to employees the full benefit of the right to self-organization and to collective bargaining"] undertook to express more explicitly the standards by which the Board is to be guided in deciding what is an appropriate bargaining unit. The conference agreement accepts this part of the amendment. The amendment also added a proviso designed to limit the otherwise broad connotation that might be put on the phrase "or other unit." The proviso, however, was subject to some misconstructions, and the conferees have agreed that the simplest way to deal with the matter is to strike out the undefined phrase "other unit." It was also agreed to insert after "plant unit" the phrase "or subdivision thereof." This was done because the [NLRB] has frequently had occasion to order an election in a unit not as broad as an "employer unit," yet not necessarily coincident with the phrases "craft unit" or "plant unit;" for example, the "production and maintenance employees" of a given plant.

II Leg. Hist. of NLRA of 1935, 3253-54, 3256, 3267. This report discussing the agreed-upon language, replacing the phrase "or other unit," again did not refer to employer consent as limiting NLRB unit determinations. After the adoption of the conference report, a discussion involving Reps. Ramspeck, Taber and Mead on the House floor about the compromise language made clear that everyone understood the Board would now be free to certify appropriate craft units covering more than one employer or plant, e.g. in the electrical or coal industries. Again, the focus of any

disagreement was whether the Board should have any such latitude at all, not whether employer consent should be required among employees of non-competing employers. See II Leg. Hist. of NLRA of 1935, 3264-66 (79 Cong. Rec. 10299-10300).

Thus, the wording of Section 9(b) permits *multi-location units* to be certified by the Board. Moreover, the conference amendment dropped the Ramspeck amendment's express proscription of the Board certifying a unit which covers employees of more than one employer. Finally, the House debates on the enacted bill indicate that 9(b) does in fact allow the Board to create units which include employees of more than one employer.

Legislative History of the Taft-Hartley Amendments, 1947

A House report on proposed 1947 amendments to the Act, makes clear that some representatives intended to ban industry-wide bargaining:

> The bill is the first attempt to deal with one of our country's greatest and more pressing problems, industry-wide bargaining and industry-wide strikes that paralyze our economy and that imperil the health and safety of our people. The committee has dealt with this problem in two ways: First, by amending the [NLRA], the bill forbids the Board to certify one union as the bargaining agent for employees of two or more competing employers, and also forbids employees of two or more competing employers to conspire together to strike at the same time...

I Leg. His. of the LMRA of 1947, 299-300 (House Report No. 245 on H.R. 3020, 8-9). A concern raised by opponents of multi-employer bargaining was that industry-wide bargaining units would adversely effect *competition*, serve to restrain trade among competing employers, and result in labor's ability to fix prices through nationalized wage levels.[22]

However, even those from industry, labor and academia who supported the practice of industry-wide bargaining appreciated the concerns associated with certifying a unit comprised of competing employers' employees, and endorsed the requirement of employer consent in such cases. For example, shipping

association representative Roth testified that the bill outlawing this practice would "create chaos" in his industry, and would serve to "abrogate virtually every...labor contract we have."[23] Nevertheless, his group thought it important that the NLRB should not have the authority even in industry-by bargaining, i.e. in a group of competing employers, to *force* an employer to "go into a unit which includes other employers."[24] Thus, management endorsed an amendment that only would proscribe the Board from certifying a multiemployer unit of employees absent the consent of all their employers.[25]

Notwithstanding such testimony and views expressed in the 1947 House debates on multi-employer bargaining units, the legislative history of the Taft-Hartley Act reveals that in light of the Board's historical requirement of employer consent in multi-employer bargaining, Congress stopped short of proscribing multi-employer units altogether. Thus, it was satisfied that the consent requirement was sufficient to guard

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[22] See, e.g., Labor Relations Program: Hearings on S. 55 et al. Before the Senate Committee on Labor and Public Welfare, 80th Cong., 1st Sess. 879-80 (1947)(statement of T.G. Graham, Vice President, B.F. Goodrich Co.).

[23] Labor Relations Program: Hearings on S. 55 et al. Before the Senate Committee on Labor and Public Welfare, 80th Cong., 1st Sess. 624 (1947)(statement of Almon E. Roth, President, National Federation of American Shipping).

[24] Ibid.; see also labor representative Whitney's call for the retention of industry-wide bargaining consented to by labor and management. Id. at 2115 (testimony of A.F. Whitney, President, Brotherhood of Railway Trainmen).

[25] Amendments to the National Labor Relations Act: Hearings on H.R. 8 et al. Before the House Committee on Education and Labor, 80th Cong., 1st Sess. 556-61, 574-75; 593-94 (1947)(statements of Almon E. Roth, President,

against both the perceived anti-competitive effects of multi-employer bargaining, and what it regarded as a practice contrary to the interests of the public health and safety, namely, Board certification of a single unit comprised of employees of competing employers.

In this regard, H.R. 3020 proposed amending Section 9(b) of the Act to be limited by a new section 9(f) which stated, in relevant part, that:

> The Board shall exercise its powers under subsections (b) and (d) subject to the following limitations: (1) A representative that has been designated as the representative of employees of any employer shall be ineligible to be certified as the representative of employees of any competing employer, unless both regularly employ fewer than 100 employees and both employers are within 50 miles of each other].[26]

Many in Congress believed that multiemployer bargaining inevitably leads to a monopoly by labor over the operations of business competitors, and crippling nation-wide strikes, in entire industries. See, e.g., I Leg. Hist. of LMRA of 1947, 612, 636, 672-74; 93 Daily Cong. Rec. H3533, 3547-48, 3575-76, April 15 & 16, 1947 (remarks of Reps. Hartley, Schwabe and Fisher). Others maintained that restricting multiemployer bargaining could not add to industrial peace since the practice actually contributed to stability, numerous

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National Federation of American Shipping; and Roland Rice, General Counsel, American Trucking Association).

industries depended on the practice, and industry-wide bargaining was accountable for achieving the important objectives of standardizing wage and employment conditions. I Leg. Hist. of the LMRA of 1947, 584, 643-44, 663; 93 Daily Cong. Rec. HA1295-97, 3551-52, 3562, March 24 & April 15, 1947 (remarks of Reps. Landis, Madden and Buchanan).

However, the proposed ban on any form of bargaining unit containing employees of more than one employer did not become part of the Taft-Hartley amendments; S. 1126, the Senate counterpart to H.R. 3020, was instead enacted, and it modified 9(b) to read as it does today (i.e. it added the provisos about professional employees and craft units). I Leg. Hist. of LMRA of 1947, 117; S. 1126, As Reported, at 19. The Senate version of 9(f) dealt with matters other than the proscription of multiemployer bargaining units. Cf. I Leg. Hist. of LMRA of 1947, 121, 122; S. 1126, As Reported, at 23, 24. "House Conference Report No. 510 on H.R. 3020," which describes the 1947 amendments to the Act, states in relevant part:

> Section 2 of the [NLRA] contains definitions of the terms used therein. Both the House bill and the Senate amendment amended section 2.
> (2) *Employer*
> The Senate amendment... provided that for the purposes of section 9(b) of the Labor Act (the section authorizing the Board to determine the appropriate collective bargaining unit) the term "employer" was not to include a group of employers

[26] I Leg. Hist. of LMRA of 1947, 58, 59, 61; H.R. 3020, As Reported, at 28, 29, 31.

> unless they had voluntarily associated themselves together for the purpose of collective bargaining....The treatment in the Senate amendment of the term "employer" for the purposes of section 9(b) is omitted from the conference agreement, since it merely restates the existing practice of the Board in the fixing of bargaining units containing employees of more than one employer, and it is not thought that the Board will or ought to change its practice in this respect.[27]

The report further states:

> Section 9(b) of the existing law -- under which the Board is given power to decide the unit which is appropriate for the purpose of collective bargaining -- was amended by both the House bill and the Senate amendment. In the Senate amendment, the limitations which were described on the Board's powers in establishing such units were contained in a proviso to section 9(b), while in the House bill the applicable limitations were contained in section 9(f).
> Under section 9(f) of the House bill the powers of the Board were circumscribed as follows:
> (1) With certain exceptions, the Board was prevented from certifying as the representative of employees of one employer a representative that had been certified as the representative of employees of a competing employer. It was this provision of the House bill which, among others, dealt with the question of industry-wide bargaining. It is omitted from the conference agreement.[28]

Thus, after consideration of views both for and against elimination of multi-employer bargaining, Congress elected not to amend the NLRA *at all*, and instead left intact the *status quo*, i.e. the Board could certify consensual multi-employer bargaining units involving competing employers. See NLRB v. Truck Drivers Local 449 (Buffalo Linen Supply), *supra*, 353 U.S. at 94-95. Moreover, unlike 1935, Congress showed

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[27] Id. at 535-536 (House Conference Report No. 510 on H.R. 3020, 31-32).

absolutely no concern about single units of multiple, non-competing employers when it addressed industry-wide bargaining in 1947.

Historical distinction between multiemployer and single or joint employer units

"The Board has held in several cases that the employees of separate companies, whose only relationship to one another is the fact that they are competitors, did not constitute a single appropriate unit." 3rd Annual Report (1938) at p.194. See, e.g., Matter of Metro-Goldwyn Mayer Studios, 7 NLRB 662 (1938), where the Board rejected a union's contention that the employees of all member companies of an association should be considered as one unit, concluding that there was no evidence that the Association was authorized by its members to control labor policies or to handle employment problems of the companies. Accord: Des Moines Steel Company, 6 NLRB 532, 535-36 (1938), where the Board concluded that the proposed unit of employees of three separate steel companies was not appropriate only because there was no structural or managerial integration of the companies, nor any history of joint bargaining: "there is no relationship among them whatsoever, except that each is a competitor of the others...." On the other hand, "[o]ne factor which may require the inclusion in

[28] I Leg. Hist. of the LMRA of 1947, 550-551 (House Conference Report No. 510 on H.R. 3020, 46-47).

one unit of employees even of competing companies which are not financially interrelated is the fact that those companies have consented to be joined together for the purposes of collective bargaining with a single representative of their respective employees." 3rd Annual Report at 195, citing Shipowners' Association of the Pacific Coast, 7 NLRB 1002 (1938).

As to different plants or departments of a single employer or employees of non-competing or "related" companies, the Board has always determined appropriate units under the "community of interest" standard. See NLRB v. Lund, 103 F.2d 815, 818-19 (8th Cir. 1939), agreeing with the Board that the terms "employer" and "person" in Section 2(2) and 2(1), as well as Section 9(b) generally, should be construed broadly. Therefore, "whoever as or in the capacity of an employer controls the employer-employee relations in an integrated industry is the employer" and the question of appropriateness of a unit only "depends upon other factors such as unity of interest, common control, dependent operation, sameness in character of work and unity of labor relations," among others. Id. at 819.

Courts have approved Board applications of these principles even where the companies involved are in the same

business, and therefore ostensibly compete with each other. See NLRB v. North American Soccer League, 613 F.2d 1379, 1383 (5th Cir. 1980), where the court found appropriate a league-wide unit absent their consent because each club exercises some control over the labor relations of the others by virtue of its proportionate role in league management. Thus the court approved the Board's unit determination since the clubs formed, through the league, an integrated group with common labor problems and centralized labor relations control. Accord: NLRB v. Checker Cab Co., 367 F.2d 692, 698 (6th Cir. 1966), where the court approved the Board's single unit determination where over 200 independent taxicab companies, through their membership in Checker Cab, "banded themselves together so as to set up joint machinery for hiring employees," establishing work rules and operating instructions, and disciplining employees who violated safety regulations, and each company thereby shared enough control over the employees of the others to warrant a joint employer finding. The court endorsed the Board's view that the statutory definitions of "person," "employer" and "employee" and the language of Section 9(b) must be read together and construed broadly, and permit the Board "to hold independent employers who have historically chosen to handle jointly such important aspects of their employer-employee relationship...

to be joint employers for the purpose of defining an appropriate bargaining unit under the NLRA." Id. at 698.

Board discussions of the rationale for basing unit determinations essentially on common interest focus on how it promotes the sense of solidarity or group identity that make collective action possible. See Portland Gas and Coke Co., 2 NLRB 552, 557 (1937): "To designate the Operating Department as one unit for the purpose of collective bargaining would promote the harmony and solidarity of the employees in that Department, whose interests are the same in all Bureaus, and would thereby facilitate the processes of collective bargaining..."; Carlisle & Jacqueline, 55 NLRB 678, 681 (1944): the "basic purpose of the determination of the appropriate unit ... is to insure that all employees who have substantially identical interests shall participate, as constituents of the same unit, in the choice of the bargaining agent for the furtherance of their joint interests." In Kalamazoo Paper Box Corp., 136 NLRB 134, 137 (1962) (cited with approval in Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass, 404 U.S. 157, 173 (1971)), the Board stated that its duty in determining appropriate units was to:

> maintain the two-fold objective of insuring to employees their rights to self-organization and freedom of choice in collective bargaining. In determining the appropriate unit, the Board delineates the grouping of employees within which

> freedom of choice may be given collective expression. At the same time it creates the context within which the process of collective bargaining must function. Because the scope of the unit is basic to and permeates the whole of the collective-bargaining relationship, each unit determination, in order to further effective expression of the statutory purposes, must have a direct relevancy to the circumstances within which collective bargaining is to take place. For, if the unit determination fails to relate to the factual situation with which the parties must deal, efficient and stable collective bargaining is undermined rather than fostered. (Citation omitted.)

As set forth in its annual reports and decided cases since the 1940s, the Board continued to differentiate between proposed units of separate but related employers, where control and community-of-interest are determinative (i.e., single or joint employer), and independent and competing companies. As to the latter, a multiple employer unit is appropriate "only if in addition to the existence of otherwise appropriate circumstances, there exists [through express or implied mutual consent] an [employer association or other agent], with authority to bargain collectively and enter into collective bargaining agreements." 6th Annual Report at 67-68 (1941) (i.e. multiemployer bargaining).

Moreover, the Board does not require actual consent if the circumstances evidence an implied consent to be bound to multiemployer bargaining. Thus, "the Board has found appropriate, also, units covering the employees of a group of independent and competing companies, when conditions were

suitable. Such multi-employer units have been established, however, only when the history of collective bargaining in the industry shows the necessity and desirability of such a unit from the standpoint of effective collective bargaining and peaceful labor relations." 7th Annual Report at 60 (1942).[29] See Rayonier Inc., 52 NLRB 1269, 1274-75(1943) (footnotes omitted), holding that normally, "a multiple-employer unit of competing companies not otherwise related except through [association membership] will not be considered appropriate" if the association cannot bind its members to collective-bargaining contracts, but that principle is inapplicable where "employers for many years established a practice of joint action in regard to labor relations by negotiation" with a union, "and have by their customary adherence to the uniform labor agreements resulting therefrom, demonstrated their desire to be bound by group rather than individual action."

[29] See also 4th Annual Report at 92-93 (1939); 9th Annual Report at 34 (1944); 11th Annual Report at 26 (1946); 12th Annual Report at 21 (1947); 14th Annual Report at 36 (1949).

Competing separate businesses, i.e. multiemployer bargaining

In Mobile Steamship Association, 8 NLRB 1297 (1938), the Board found a multiemployer unit appropriate over objections of employers, based on evidence of bargaining through association and lack of any individual bargaining by the members of the association. The Board's power and policy rationale for finding multiemployer units appropriate over the objections of individual competing employers whose conduct indicated consent to group bargaining was set forth succinctly in Waterfront Employers Association of the Pacific Coast, 71 NLRB 80, 111 (1946):

> this Board is empowered by the Act to find multiple-employer units appropriate for the purposes of collective bargaining, ... we may properly exercise that power under the circumstances in this case. We are not persuaded otherwise by the fact that the companies and employer associations have indicated that they do not desire multiple-employer units. To hold in all cases, especially where the employers have themselves acted on a multiple-employer basis, that the Board is precluded in the face of employer opposition from finding a multiple-employer unit to be appropriate, is to permit the employers to shape the bargaining unit at will, notwithstanding the presence of compelling factors, including their own past conduct, decisively negating the position they have taken. Contrary to the mandate given the Board under the Act, such a holding would in effect vest in the hands of the employers rather than the Board the power to determine the appropriate unit for collective bargaining purposes.

On the other hand, in Aluminum Line, 8 NLRB 1325, 1341 (1938), although unions sought a port-wide unit encompassing

several steamship companies-association members, the Board found multiemployer unit inappropriate because the individual employers retained and exercised "direct control over the essential employer functions." It distinguished the multiemployer unit finding in Shipowners of the Pacific, *supra*, because even when the association engaged in bargaining on behalf of some of its members, the members were not bound by the association's negotiations and, on many occasions, the companies entered into separate and individual agreements.

In the 1950s, the Board articulated its practice in determining the appropriateness of a multiemployer unit over the years: "mutual consent of the union and employers involved is a basic ingredient necessary to support the appropriateness of a multiemployer unit."[30] In Yellow Cab Co., 208 NLRB 1020, 1021 (1974), the Board held that "[a]bsent a joint-employer relationship finding, the unit petitioned for herein necessarily becomes inappropriate in the absence of a consensual agreement among the various taxicab company 'independents' and franchisees to join together in a multiemployer unit."

[30] E.g., Andes Fruit Co., 124 NLRB 781, 783 (1959); Retail Associates, 120 NLRB 388, 393 (1958); Sacramento Automotive Assn., 193 NLRB 745 (1971). However, consent only relates to the *formation* of a multiemployer unit and not to the statutory duty to bargain only *in an appropriate unit*, because otherwise all authority over unit composition would be lodged in the parties "and, in effect, deprive the Board of its duty under Section 9 to decide in each case the appropriate unit that will assure to employees the fullest freedom in exercising the rights guaranteed under the Act." Steamship Trade Assn. of Baltimore, etc., 155 NLRB 232, 234 (1965).

Non-competing companies, i.e. single or joint employers

As noted above, where one or more entities control employee working conditions, the focus of the Board's unit determinations are "the objectives of ensuring employee self-organization, promoting freedom of choice in collective bargaining, and advancement of industrial peace and stability. These objectives are realized when the members of a unit share, inter alia, a community of interest in wages, hours, and other terms and conditions of employment." P. G. Dick Contracting, 290 NLRB 150, 151 (1988). Accord: South Prairie Construction Co. v. Operating Engineers, 425 U.S. 800, 805 (1976).

In NLRB v. Lund, 103 F.2d 815, 818 (8th Cir. 1939), enforcing 6 NLRB 423 (1938), the court agreed with the Board that a unit including employees of two separate companies was appropriate because the owner exercised control over the operations of both and the companies formed an integrated industry acting as one employer; employees occasionally were transferred from plant to plant and generally did the same kind of work, requiring the same degree of skill; and if the owner could deal with the employees as separate units, "collective bargaining would be a farce" since "he could force competition between the two groups of his employees to their

detriment and his gain." However, in Union Lumber Co., 7 NLRB 1094, 1096 (1938), the Board disagreed with a union and company contention that the appropriate unit should include employees of a private contractor (which today would constitute an alleged joint employer) on the basis that the company dictated the wages, hours and working conditions of the contractor's employees: "There is no showing in the record that the Company exercises any control whatsoever over the hiring or discharge of such persons; nor is there any showing as to the extent or nature of the alleged dictation relative to wages, hours, and working conditions."

Many of the early cases involved such elements of single, rather than joint, employer status as common ownership and management.[31] However, the Board clearly uses the same standard applicable to individual and joint employers, i.e. community of interest, to determine whether employees of various entities constituting a single employer are an appropriate unit. See Peter Kiewit Sons' Co., 231 NLRB 76, 77 (1977) (footnote omitted):

> The ultimate unit determination is thus resolved by weighing all the factors relevant to the community of interests of the employees. Where, as here, we are concerned with more than one operation of a

[31] E.g. Commercial Equipment Co., 95 NLRB 354 (1951); Deep River Timber Co., 37 NLRB 210, 216 (1941) (interrelation of logging company and subcontractors' operations at logging camp, control by company or subcontractor employees working at the camp, and company responsibility for employee wages and working conditions).

> single employer, the following factors are particularly relevant; the bargaining history; the functional integration of operations; the differences in the types of work and the skills of employees; the extent of centralization of management and supervision, particularly in regard to labor relations, hiring, discipline, and control of day-to-day operations; and the extent of interchange and contact between the groups of employees.

The Board also noted that while the two companies therein "are not, in the traditional sense, separate plants, the factors used to determine whether a multiplant or a single-plant unit is appropriate are relevant here." Id. at 77 n.7.

Moreover, cases determining the sufficiency of control over employees by more than one company, indicating a community of interest such that a single appropriate unit exists without regard to employer consent, often used phrases like "integrated" or "interrelated" enterprise regardless of whether the companies today would be considered "single" or "joint" employers.[32] See Brown and Co., 59 NLRB 285, 287 (1944) (vessel agent contracting with two steamship companies to negotiate their commercial contracts and hire ship employees, where all companies maintained a common office and had the same president, was also an employer of the employees

[32] Compare Sa-Mor Quality Brass, 93 NLRB 1225, 1227 (1951) (given "common control and the integration of production operations," two companies constituted "single" employer, and "despite the brief period of bargaining by the Employers with District 50 on a single company basis, a unit comprising the employees of both companies is appropriate"), Silverstein Brothers, 93 NLRB 1074 (1951) (unit of employees of 3 separate companies inappropriate absent sufficient integration of the companies to make them a

and "all unlicensed personnel of the Companies... constitute a single unit appropriate" for bargaining under Section 9(b)); Springfield Union Publishing Co., 64 NLRB 869, 871 (1945) (single unit of all editorial employees of four newspapers published by two separate companies appropriate, where companies "jointly employ the employees" given common pressroom/circulation department, personnel director and some interchange among editorial staff employees); Stineway Drug Co., 102 NLRB 1630, 1633 (1953) (all employees of stores directly owned by Stineway and those owned individually by licensees (System) constituted appropriate unit of the "single employer", as "employees of both are joined by a substantial community of interests in their conditions of employment," i.e. much employee transfer among stores, System followed Stineway's suggestions regarding wages and hours although System stores had right to set their own, Stineway and System both had role in hiring, and Stineway determined work environment at System by organizing departments, product display, etc.). Compare Swanson Brothers Logging Co., 71 NLRB 614, 615-16 (1946), where the Board found inappropriate a single unit of supplier and user employees, noting that although it had "in certain instances, considered the economic acts surrounding the relations between employers as bearing upon the finding of an over-all employer relationship, the

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"single" employer, noting separate supervision, separation and lack of

basis for such a finding customarily has included some evidence of control with respect to the labor relations of the particular employer or the right to affect conditions of employment among the latter's employees." In Swanson, there was nothing in the language or effectuation of the parties' contract entitling the user to control the supplier of logging operations' labor relations or its employees' working conditions, although the user reserved the right to terminate the subcontract for economic reasons and to disapprove the manner in which the supplier conducted the logging.

In the 1960s, the Board began explicitly differentiating between separate competing companies on the one hand, and both single and joint employers on the other. As to the latter category, it made clear that employer consent, whether express or implied, is not required in finding a unit involving employees of joint employers to be appropriate. The existence of a joint employer relationship based on control of some employment conditions, along with a sufficient community of interest among the employees, is sufficient to find appropriate a single unit of both companies' employees. See Jewel Tea Co., 162 NLRB 508 (1966); Hoskins Ready-Mix Concrete, 161 NLRB 1492 (1966); S.S. Kresge, 169 NLRB 442 (1968), enfd. in rel. part 416 F.2d 1225 (6th Cir. 1969); Gallenkamp Stores Co. v. NLRB, 402 F.2d 525 (9th Cir. 1968),

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interchange among employees).

enforcing 162 NLRB 498 (1966); Jewell Smokeless Coal, 170 NLRB 392, 175 NLRB 57 (1969), enfd. 435 F.2d 1270, 76 LRRM 2110 (4th Cir. 1970); Frostco Super Save Stores, 138 NLRB 125 (1962); Spartan Department Stores, 140 NLRB 608 (1963); AMP, 218 NLRB 33 (1975); Thriftown, 161 NLRB 603 (1966).[33]

In Bowdoin College, 190 NLRB 193, 194 (1971), the Board rejected the argument that the unit should be limited to individuals employed only by the college, and found appropriate the petitioned-for unit of all college employees including employees of separately incorporated fraternities. The Board noted the degree of college control "over the functions, the services, and these employees of the fraternities, and the interdependence of the college and the fraternities," in finding the college was at least a joint employer of certain fraternity employees justifying their inclusion in the unit although the college clearly did not consent. See also North American Soccer League, 236 NLRB 1317, 1320-22 (1978), enfd. 613 F.2d 1379 (5th Cir. 1980), where after the Board found the league and each member club were joint employers of each club's players and that single-club units might have been appropriate if elections had been sought therein, the Board found the petitioned-for league-wide unit appropriate. It relied on its joint employer finding, noting the substantial degree of control exercised by the

[33] Cf. Esqro Anaheim, 150 NLRB 401 (1965); Triumph Sales, 154 NLRB 916 (1966) (divided Board found license agreements did not create joint

league over the players' employment conditions, and on the difficulty of achieving labor relations stability with single-club units given the nature of the relationship between the league and clubs.

Greenhoot consistent with these established principles

Greenhoot, Inc., 205 NLRB 250, 251 (1973), involved a number of competing joint employer relationships between one supplier management company and owners of several separate buildings. The building owner users of maintenance employees competed with each other for tenants, exercised no control over employees working at buildings other than their own, and the Board specifically found no interchange, or other evidence of a community of interests, among the supplier employees who worked at each building. Thus, implicit in the Board's decision was that a multi-building unit was inappropriate without regard to multiemployer unit principles.

Moreover, the Board found that each "individual owner and the [supplier] have significant employment functions" such that the supplier and the users "at each building share or codetermine matters governing the essential terms and conditions of employment" and were "joint employers at each of the respective buildings." However, there was no evidence

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employer status, and directed election in separate units).

that the business relationships between the supplier, which exercised some control over employees at *all* the buildings, and each of the users, which exercised some control *only at its own* building, were structured in such a way that the users "delegated" to the supplier common uniform control over all their employees, and thus no user exercised "some" control over the employees of the other users. Therefore, the petitioned-for multi-location unit was a classic multiemployer unit involving competing employers for which consent of the union and all involved employers was required.

The business relationship between the supplier and each building owner was clearly distinguishable from the department store cases discussed above. Thus, in S.S. Kresge, *supra*, 161 NLRB at 1128-29, enfd. 416 F.2d 1225 (6th Cir. 1969), a storewide unit including employees of separate licensees where the license agreement reserved to the licensor "the power substantially to affect the employment conditions of employees in licensed departments" such that the licensor was a joint employer of the employees of each of the licensees. In Thriftown, *supra*, 161 at 606-08, the Board found appropriate a single storewide unit including employees of the store owner and a shoe department operated by a separate entity where all store employees were "subject to common overall supervision, they use common facilities, and there is a similarity of

working conditions," and where the operating agreement reserved to the owner the right to control, through its rules and policies, the "manner and method of work performance" of all employees, and the right to dissolve the business relationship, such that "the owner and operator are joint employers of the employees of the operator." See Frostco Super Save Stores, *supra*, 138 NLRB at 128-29, where the Board found the store owner and all its licensees were joint employers based on the owner's contractual retention of the ability to control general working conditions in the store and to participate in negotiations with, and approve labor contracts executed by, licensees. However, although a single storewide unit was found appropriate as to employees of all licensees based on their community of interest (i.e. same general skills, common facilities and similar working conditions), the Board permitted employees of a grocery/meat department licensor to vote in a separate unit if they so desired based on such differences in that employer's license agreement as the lack of licensor regulation of advertising, supplying purchasing, prices and records. Moreover, those employees used different timeclocks, facilities, equipment and entrances than employees of other licensees. Thus, in Frostco, the owner exercised sufficient control to be a joint employer of *all* the licensees' employees, and the Board examined only whether a sufficient community of interest

existed to render a storewide unit appropriate, not whether the various joint employers consented to such a unit. Accord: Gallenkamp Stores Co. v. NLRB, *supra*, 402 F.2d at 530, 532 (9th Cir. 1968), the court agreed with the Board's finding of joint employers based on the licensor's right to control the licensee's labor relations under the licensing agreement and, absent any past separate bargaining history, with the appropriateness of a single storewide unit based on the same factors that supported a joint employer finding. Where one joint employer exercises such control over employees of the other joint employer, the court noted that a "store wide unit thus becomes the equivalent of a plant unit within the meaning of Section 9 of the Act," and plant units "have been extensively approved by the Board." In contrast, the court noted that where a licensor retains control only "to secure adherence by the licensees to merchandising policies, standards, and practices formulated by the licensor," but not over the personnel and labor policies of its licensees, the Board has found that the licensor and licensees are not joint employers of the licensees' employees "and that a single storewide unit is therefore inappropriate," citing S.A.G.E., Inc. of Houston, 146 NLRB 325, 326-28 (1964).

Moreover, in Bowdoin College, *supra*, 190 NLRB at 194, the Board found that although the separately incorporated

fraternities only control employment conditions of their own employees, their joint employer (the college) possessed sufficient control "over the functions, the services, and these employees of the fraternities," and given "the interdependence of the college and the fraternities, we find that the college is, at the very least, a joint employer" of certain fraternity employees who share a community of interest with other college employees sufficient to warrant their inclusion in a single unit, citing Jewell Smokeless Coal Corp., *supra*, 175 NLRB 57 (1969), enfd. 435 F.2d 1270 (4th Cir. 1970), and never mentioning the joint employers' lack of consent. The Board excluded other fraternity employees because they were not jointly employed by the college, but rather were solely employed by the fraternities. Id. at 194. Also distinguishable from Greenhoot is NLRB v. North American Soccer League, *supra*, 613 F.2d at 1383, where separate companies contractually structured their business relationships so that one entity exercised the right to control some employment conditions of each company's employees by, e.g., setting uniform personnel policies. See also Checker Cab Co. and its Members, *supra*, 141 NLRB at 589, where a Board majority rejected the dissent's argument that "if a joint-employer relationship exists at all, it can only be between Checker and each of its members *separately*." Thus, the Board found that "operating methods of the integrated

taxicab business here... justify our further finding that each of these owners and Checker are joint employers *in a common enterprise*....Each of the cab owners thus, by his participation in Checker, does in fact have some measure of control over the employment conditions of the other owners' drivers." (Emphasis in original.) Despite the lack of consent of all these joint employers, the Board directed an election among all their drivers in a single unit. Id. at 590.

The Application of Greenhoot multiemployer concepts to joint employers should be abandoned as inconsistent with precedent and sound policy

The extension of multiemployer consent principles to joint employers that do not compete and whose jointly employed workers share a community of interests with employees of only one of the joint employers deviates from years of Board precedent discussed above. In Lee Hospital, 300 NLRB 947 (1990), the Board found a community of interest sufficient to include the supplier's CRNAs in the unit covering the hospital's other professional employees. The Board found that the hospital and the referral company were not joint employers, but noted in dicta that even if they had been, it would not be able to certify the unit as appropriate, absent both employers' consent, citing Greenhoot. In Flatbush Manor Care, 313 NLRB 591 (1993), the Board found that the user and the agencies referring the "pool" LPNs were joint employers,

and that the LPNs must be excluded from the unit of user employees found appropriate because there was no indication of the employers' consent, citing Lee Hospital and Greenhoot. The Board never discussed whether a sufficient community of interest otherwise might exist to warrant their inclusion.

In Brookdale Hospital Medical Center, 313 NLRB 592 (1993), the Board found the user and the various referring agencies to be joint employers, and that as such, under Greenhoot and Lee Hospital, the agency-referred therapists had to be excluded from the bargaining unit of the user's therapists absent consent of the user and suppliers. In responding to Member Devaney's dissent that the agency-referred therapists were employees of the hospital alone, the Board majority disagreed that the differences between the employee groups (manner of referral and remuneration) were minimal, 313 NLRB at 593, and implicitly agreed with Member Devaney that otherwise all therapists shared a community of interest by performing identical work at the hospital with the same equipment and supplies, supervision, schedules, policies, etc. 313 NLRB at 594. Accord: Hexacomb Corp., 313 NLRB 983 (1994); Connecticut Yankee Atomic Power Co., 317 NLRB 1266, 1268 (1995).

The fact that one of the joint employers, typically the supplier, does not control workers solely employed by the user, is not dispositive of whether consent of the various employers is necessary before a single unit of all employees of the joint employers can be appropriate. As discussed above, in the retail store cases, Bowdoin College, North American Soccer League, and Checker Cab, all that was necessary before finding appropriate a single unit of all joint employer employees was a showing that *one* of the joint employers exercised a sufficient right of control over employees of the others, and therefore the operations could be viewed as a single, non-competing enterprise. In these circumstances, the appropriateness of a single unit is determined solely by a traditional examination as to whether all employees of the joint employers share a community of interest. Thus, the Board erroneously transferred the consent requirement of Greenhoot and other cases involving single unit determinations, where competing employers lacked control over employees not their own, to such joint employer situations as in the "hospital" cases cited above, as they were no different from prior joint employer cases where employers similarly objected to the imposition of a single unit. See e.g. NLRB v. Checker Cab, *supra*, where the Sixth Circuit rejected the employers' contention that a single multiemployer unit of all employees of each individual cab company cannot be imposed

absent their consent since they competed with each other for riders. The court agreed with the Board majority that since each company exercised some control over the employees of all the other companies due to the structure of their various commercial relationships with Checker Cab, i.e. since they had chosen "to subject their employees to regulation on a joint basis, the employers within Checker must likewise accept the statutory right of their employees to join together for the purposes of collective bargaining. 141 NLRB 583, 586-87 (1963). Greenhoot is distinguishable since the competing building owners there did not similarly subject their employees to extensive regulation on a joint basis through the supplier.

The extension of a consent requirement to joint employer cases further has no sound policy foundation, since it tends to decrease stable and effective collective bargaining and to deprive employees of representation in a group working for the same enterprise often at the same location. See NLRB v. North American Soccer League, 613 F.2d 1379, 1383 (5th Cir. 1980), where the court specifically rejected the contention of the joint employers that Greenhoot precluded a league-wide unit absent their consent because each club exercises some control over the labor relations of the others by virtue of its proportionate role in league management, whereas the building

owners in Greenhoot exercised no control through the management company over the activities of other owners. The court approved the Board's unit determination since the clubs formed, through the league, an integrated group with common labor problems and a high degree of centralized labor relations control. It also specifically rejected the employers' argument that "because the teams compete on the field and in hiring, only team units are appropriate for collective bargaining purposes."

Finally, there are no additional practical problems for collective bargaining flowing from elimination of consent as a factor in determining appropriate joint employer units than those which exist for various departments or plants of an individual employer's employees with different skills and responsibilities. See S.S. Kresge v. NLRB, *supra*, 416 F.2d at 1231, where the 6th Circuit rejected the store's contention that forcing unwilling employers to bargain as joint employers would disrupt bargaining because each licensee may have its own ideas regarding labor policy, and would undermine the Section 7 rights of licensee employees, who were outnumbered by store employees and would have no meaningful say in union policy. The court quoted Gallenkamp Stores Co. v. NLRB, *supra*, 402 F.2d at 531: "[the store] and the licensees have worked out their diverse business problems to meet the needs

of their joint enterprise, as is shown in their uniform license agreements. Like efforts should be as effective in their bargaining with the Union."

CONCLUSION

The Board should return to basing its traditional determination of joint employer status on whether separate entities have so structured their commercial relationship that, in reality, one entity has the right to control some employment conditions of the other entity's employees. Such a relationship, often held out to the public and/or employees as an integrated entity and found to constitute joint employer status under the Board's traditional test, has also been found to constitute a joint employer relationship under the "hybrid" test construing the definition of "employer" under other federal remedial statutes. Additionally, the Board should abandon the extension of the employer consent requirement, necessary prior to finding appropriate a single unit of employees of competing employers for traditional multiemployer bargaining, to cases involving employees of joint employers.

Respectfully Submitted,

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David A. Colangelo
Counsel for the General Counsel
National Labor Relations Board
Office of the General Counsel
1099 14th Street, NW
Washington, DC 20570
(202)-273-3831

Date: November 15, 1996

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Brief of the General Counsel was duly sent by certified mail, return receipt requested, to all parties listed below on this 15th day of November, 1996.

David W. Miller, Esq.
Baker & Daniels
300 North Meridian Street
Suite 2700
Indianapolis, IN 46204-1782

Terry W. Dawson, Esq.
Barnes & Thornburg
1313 Merchants Bank Bldg.
11 South Meridian Street
Indianapolis, IN 46204

Betty Grdina Associate GC
International Brotherhood of
Teamsters Local Union 89 AFL-CIO
25 Louisiana Avenue, N.W.
Washington, D.C. 20001

Harry Sangerman, Esq.
McDermott Will & Emory
227 West Monroe Street
Chicago, IL 60603

Fred Feinstein, General Counsel
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

Richard Ahearn, RD
Region 9, NLRB
550 Main Street
Rm. 3003
Cincinnati, OH 45202
3271

Daniel R. Begian, Esq.
McMahon Berger Hanna
Lonhan Cody & McCarthy
2730 North Ballas Rd., Suite 200
P.O. Box 31901
St. Louis MO 63131-3039

Ralph Tremain, RD
Region 14, NLRB
1222 Spruce Street
Room 8302
St. Louis, MO 63103-2829

Barry Levine, Esq.
Souder & Levine
1101 Olivette Executive Parkway
Suite 102, P.O. Box 21532
Saint Louis, MO 63132-0532

Glenn Zipp, RD
Region 33, NLRB
300 Hamilton Blvd.
Suite 200
Peoria, IL 61602-1246

Alton Priddy, Esq.
Hardy Logan Priddy & Cotton
604 Republic Building
429 West Mohammed Ali Blvd.
Louisville, KY 40202

John J. Toomey, Esq.
Arnold & Kadjan
19 West Jackson Blvd.
Suite 300
Chicago, IL 60604-3958

Theodore Green, Associate GC
Laborer's International Union
905 16th Street, N.W.
Washington, D.C. 20006

Daniel V. Yager,
Labor Policy Association
1015 15th Street, NW
Washington, DC 20005

Daniel J. Ratner, Esq.
Levy Pollack Ratner
& Behroozi PC
80 Eighth Avenue
New York, NY 10011-5126

John N. Raudabaugh, Esq.
Matkov Salzman Madoff &
Gunn
55 East Monroe Street
Suite 2900
Chicago, IL 60603-5709

Larry Engelstein, Associate GC
American Federation of Labor
And Congress of Industrial
Organizations
915 Sixteenth Street, N.W.
Washington, D.C. 20005

Mona C. Zeiberg, Esq.
United States Chamber of
Commerce
The National Chamber
Litigation Center
1615 H Street, N.W.
Wash., D.C. 20062-2000

David A. Colangelo
Counsel for the General Counsel
1099 14th Street, N.W.
Room 10416
Washington, D.C. 20750

Maurice Baskin, Esq.
Venable Baetjer Howard
& Civiletti LLP
1201 New York Ave., N.W.
Washington, D.C. 20005

John S. Irving, Esq.
Kirkland & Ellis
655 Fifteenth Street, N.W.
Washington, D.C. 20005

Robert T. Thompson, Esq.
Thompson & Hutson
1317 F Street, N.W.
Suite 900
Washington, D.C. 20004

Francis T. Coleman, Esq.
Harrison & Ford
1000 Vermont Avenue, N.W.
Washington, D.C. 20005

Herzl S. Eisenstadt,
Esq.
Gleason & Mathews PC
26 Broadway 17th Floor
New York, NY 10004-1864

Peter A. Susser, General Counsel
Driver Employer Council
of America
Littler Mendelson Fastiff Tichy &
Mathiason
1225 I Street, N.W. Suite 1000
Washington, D.C. 20005

Stephen A. Yokich, Esq.
Associate GC
International Union,
United Automobile,
Aerospace & Agricultural
Implement Workers of
America, UAW
1757 N Street, N.W.
Washington, D.C. 20036

David A. Colangelo
Counsel for the General Counsel
National Labor Relations Board
Office of the General Counsel
1099 14th Street, NW
Washington, DC 20570
(202) 273-3831